**TANG KEE POH**

**v.**

**PUBLIC PROSECUTOR**

HIGH COURT, SIBU
TUAN STEVE SHIM LIP KIONG J:
[CRIMINAL APPEAL NO. 10 OF 1992]
18 JANUARY 1993

***CRIMINAL LAW & PROCEDURE: Charge under s. 411 Penal Code - Whether elements of the charge proven - Whether prosecution had made out a prima facie case.***

The appellant was charged in the Magistrate's Court with dishonestly retaining stolen properties having reason to believe them to be stolen pursuant to s. 411 of the Penal Code.

The learned Magistrate came to the conclusion that the prosecution had proved a *prima facie* case and called upon the appellant to enter his defence. Upon the appellant remaining silent, he was found guilty and sentenced.

The question that arose on appeal was whether the learned Magistrate was right in law in ruling that the prosecution had established a *prima facie* case.

**Held:**

**[1]** No evidence had been led by the prosecution as to the existence of any incriminating statement being made by the appellant at the time of the production and/or discovery of the stolen properties. The production or discovery or recovery of the stolen properties did not by itself establish possession.

**[2]** The evidence shows that the stolen properties were recovered from places or premises not exclusively occupied by the appellant and which were accessible to other people.

**[3]** There was no credible evidence to sustain the element of possession or to indicate that the appellant had reason to believe the recovered properties to be stolen properties.

**[4]** The prosecution had failed to establish on a *prima facie* basis that the appellant had dishonestly retained the stolen properties having reason to believe them to be stolen.

*[Appeal allowed. Conviction quashed].*

**Cases referred to:**

*Public Prosecutor v. Hong Ah Huat [1971] 1 MLJ 52 at p. 53 (**refd**)*

*Chavadappa Pujari & Ors. v. Emperor, AIR 1945 Bom. 292 (**refd**)*

**Legislation referred to:**

Penal Code, s. 411
Evidence Act 1950, s. 27

**Other sources referred to:**

**The Law of Crimes** (Rat. & Dhir - 23rd ed.) at p. 1579

*For the appellant - Hii Hieng Sing; M/s. Hii & Co.*
*For the public prosecutor - Mohd. Zaki bin Md. Yasin, SFC*

**JUDGMENT**

**Steve Shim Lip Kiong J:**

This is an appeal by Tang Kee Poh (appellant) against his conviction by the Magistrate's Court, Sibu, for an offence under s. 411 of the Penal Code. Thereat, the appellant was charged with dishonestly retaining stolen properties belonging to one Lau Hieng Kii having reason to believe them to be stolen. He was found guilty and sentenced to 3 months imprisonment.

It is, I think, sufficient to dispose of this appeal if I consider the main ground raised by the appellant relating to the question of whether the learned Magistrate had erred in law in ruling that there was a *prima facie* case at the end of the prosecution's case. The other grounds are essentially ancilliary or consequential in nature and effect. It should perhaps be noted that the appellant was found guilty when he chose to remain silent after his defence had been called.

It seems clear, on the record, that at the end of the prosecutions' case, the learned Magistrate, after listing out the essential elements of the offence required to be proved under s. 411 of the Penal Code, proceeded to summarise briefly the evidence of certain prosecution witnesses and thereafter came to the following conclusion:

> Mahkamah ini telah menimbang segala keterangan yang dikemukakan oleh pihak pendakwa. Persoalan untuk Mahkamah ini pada ketika ini adalah samada pihak pendakwa telah mengemukakan keterangan yang boleh dipercayai bagi setiap satu unsur penting tuduhan ini yang sekiranya tidak disangkal akan menyebabkan orang kena tuduh disabitkan untuk tuduhan tersebut.
>
> Jawapan kepada soalan ini adalah ya. Pihak pendakwa telahpun membuktikan suatu kes *prima facie*. Orang kena tuduh dipanggil membuat pembelaannya.

The learned Magistrate did not appear to have conducted any or any proper evaluation or examination of the evidence adduced by the prosecution in coming to the above conclusion. She had merely summarised briefly the evidence of some of the prosecution witnesses, in particular PW2, PW4 and PW5. Be that as it may and in the circumstances, the question can be posed as to whether that conclusion can be supported in law having regard to the evidence examined in the light of the essential requirements necessary to sustain the charge against the appellant. What then are these essential requirements?

In the context of this case, the prosecution has to prove:

(1) that the properties forming the subject-matter of the charge had been stolen and,

(2) that the appellant dishonestly retained the stolen properties having reason to believe them to be stolen.

In this connection, I do not think there is any doubt that there is sufficient credible evidence or evidence not inherently incredible to show that the properties in question were stolen properties. This is clearly reflected in the evidence of Lau Hieng Kii (PW2) who had testified in effect that on 4 September 1986 at about 8.15 a.m., he discovered his office broken into and ransacked by person or persons unknown; that certain properties therein were stolen; that as a result, he lodged a police report; that subsequently, he was called to the police station where he identified the stolen properties recovered by the police. He was also able to identify the same properties in Court. The first essential requirement aforesaid has clearly been established at the end of the prosecution's case.

To establish the second essential requirement, it is incumbent on the prosecution to show:

(1) that the stolen properties were in the possession of the appellant,

(2) that some person other than the appellant had possession of the properties before the appellant got possession of them and,

(3) that the appellant had knowledge or reason to believe that the said properties were stolen properties: see **The Law of Crimes** (Rat. & Dhir - 23rd ed.) at p. 1579.

The word "possession" implies a physical capacity to deal with a thing as we like to the exclusion of everyone and a determination to exercise that physical power on ones' behalf. It implies dominion and consciousness in the mind of the person having dominion over the object. Possession must be conscious and intelligent possession and not merely the physical presence of the Accused in proximity or even in close proximity to the object: per Sharma J. in *Public Prosecutor v. Hong Ah Huat* [1971] 1 MLJ 52 at p. 53.

In the light of the stated principles, does the evidence in the instant case establish that the stolen properties were in the possession of the appellant at all material times? It should be noted Chief Inspector Awg. Kesumajaya (PW5), the investigating officer, had testified in his examination-in-chief that the appellant was arrested on 6 September 1986 and thereafter on the same day, led a police party including PW5 to three different places where the stolen properties allegedly kept by the appellant were recovered. In cross-examination, when PW5 was asked what he meant by "kept by him (appellant)" he responded thus:

> The suspect led us to 3 different places where he kept the goods and he voluntarily gave them up. That means Accused kept them there.

And when he was asked whether he had any other proof he said:

> Only the information and the fact that the Accused was leading us there and the goods were found there.

Then in re-examination, he said:

> Accused led us to the places where the goods were kept.

It would seem clear from the excerpts underscored that PW5 was merely stating an opinion based conceivably upon the fact that it was the appellant who led them to where the stolen properties were recovered. There is certainly no evidence to indicate or suggest how the properties in question came to be there. The position is not entirely dissimilar to that found in *Public Prosecutor v. Hong Ah Huat, supra,* where it was held that although the items subject-matter of the charge under s. 411 of the Penal Code were recovered at the back of the Accused's house and it was the Accused who led the police to the discovery of the stolen items, their production, without more, did not

necessarily prove possession. In support, the Court referred to a passage from an Indian case of *Chavadappa Pujari & Ors. v. Emperor,* AIR 1945 Bom. 292 which states *inter alia:*

> Where they (the stolen goods) are on the person of the Accused or in the houses or fields exclusively occupied by them, they can be no doubt that they must be deemed to be in their possession. But in quite a number of cases, stolen property is produced without any incriminating statement from a place which is not exclusively occupied by the Accused or which is of the ownership of another person. In such cases, a good deal depends upon whether the production was accompanied by information given by the Accused in custody as would be admissible in evidence under s. 27. Such information can be relied on by the prosecution as incriminating evidence against the Accused along with the production or discovery of stolen property. But the production of the property itself would not necessarily prove his possession. It would at the most show that he had knowledge where the property was kept or concealed. Thus, where it is proved that the Accused made a statement to the effect that 'I have concealed the property at a particular place and I will produce it', and if it is discovered in consequence of that statement, it would be evidence of his possession, even though the stolen articles are kept or concealed in another man's property, because unless he had possession he could not have kept them at that place. Where however the Accused, without stating that he had concealed stolen property, merely produces it from a place to which other people could have access, it would not be sufficient to establish his possession even though the property may be concealed, because it is consistent with any other person having done so and the Accused might have merely knowledge of it. In the absence of any incriminating statement made by the Accused leading to the discovery of the property, its production alone from another man's property would not be sufficient to establish the Accused's possession. It may at the most show his knowledge that the property was concealed there. The mere knowledge that stolen property is lying hidden somewhere is not incriminating circumstance for the offence of theft or receiving stolen property and such knowledge cannot by itself raise a presumption of possession. It is the prosecution that has to establish Accused's possession apart from his knowledge and it is only when his possession is proved that the Accused has to account for it in order to escape from the presumption under Illustration (a) to s. 114.

In our case, no evidence had been led by the prosecution as to the existence of any incriminating statement being made by the appellant at the time of the production and or discovery of the stolen properties. No incriminating statement of the nature admissible under s. 27 had been uttered by the appellant leading to the recovery of the stolen properties. Thus, the production or discovery or recovery of those stolen properties did not by itself establish possession. Here, the appellant, without stating that he had concealed or kept the stolen properties in question, merely led the police to places where the said properties were recovered. The evidence shows that the stolen properties were recovered from places or premises not exclusively occupied by the appellant. Besides, such places were apparently accessible to other people. There is no credible evidence to sustain the element of possession by the appellant at the end of the prosecution's case. There is also no credible evidence to indicate or suggest that the appellant had reason to believe the recovered properties to be stolen properties. In the circumstances, the prosecution has obviously failed to establish, on a *prima facie* basis, the second essential requirement that the appellant had dishonestly retained the stolen properties having reason to believe them to be stolen.

I need not touch on the other grounds of appeal. Suffice it to say that for the reasons stated, I am of the view that the conclusion arrived at by the learned Magistrate in holding that the prosecution has established a *prima facie* case is wrong in law. The appeal is therefore allowed. Conviction quashed.